

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

Date of Decision: 27-9-1995

Special Civil Application No. 7256 of 1995

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For Approval and Signature:

THE HON'BLE MR. JUSTICE B.C. PATEL, J.

And

THE HON'BLE MR. JUSTICE H.R. SHELAT.

1. Whether Reporters of Local Papers may be allowed to see the Judgment ?
2. To be referred to the Reporter or not ?
3. Whether Their Lordships wish to see the fair copy of Judgment ?
4. Whether this case involves substantial question of law as to the interpretation of the Constitution of India, 1950 or any order made thereunder ?
5. Whether it is to be circulated to the Civil Judge?

Coram: B.C. Patel, J. & H.R. Shelat, J.
(27-9-1995)

ORAL JUDGMENT: (Per: B.C. Patel, J.)

1. The Special Land Acquisition Officer, Branch No.4, Surat, on the proceedings initiated under the Land Acquisition Act, declared an award, Annexure 'A' on 6-6-1990. Validity of this award was challenged by the petitioners by preferring Special Civil Application No. 4364 of 1990 before this Court. Advocate for the petitioners, Miss. V.P. Shah, made the following statement before this Court. (vide order at Annexure 'B')

"Under instructions from the petitioners, Miss V.P. Shah stated that the petitioners will submit a proposal to the Corporation to the effect that if they are given land bearing Nondh No. 2229 together with constructions for the school made thereon, they will hand over the entire

Nondh No. 2161 and with all constructions for the school building of the same area, as is put up in Nondh No. 2229, at their costs, in exchange."

This Court it seems, after hearing the parties, was prima facie of the view that the course suggested by the petitioners is eminently reasonable and the Court hoped that the Corporation will sympathetically consider the proposal of the petitioners. Ld. Advocate for the petitioners sought permission of the Court to withdraw the petition. Permission was granted and the petition has been disposed of as withdrawn. The Court vacated the ad-interim relief granted earlier.

2. Reading the order of this Court, it is very clear that the petitioners instructed the ld. Advocate to withdraw the petition. The reason stated was that the petitioners wanted to make a proposal to the Corporation and the Court granted the permission simpliciter. Vide Annexure 'C', petitioners power of attorney holder forwarded representation on 27-2-1991 stating in paragraph 2 that the proposal is forwarded as suggested by the Hon'ble High Court and if the same is accepted by the Municipal Corporation it will be beneficial. The said proposal is rejected as stated by the ld. Advocate, however no order is placed on the record. From the order, it is clear that Court did not suggest.

3. The present Special Civil Application was earlier heard and thereafter petitioners filed an affidavit of power of attorney holder explaining the delay wherein the deponent has stated that "Commissioner, Mr. Balvantsingh wrote a letter which was received in 1994 rejecting my application for compromise. The said letter is lost due to my eye weakness, cataract and old age. After receiving the said letter, I had gone to my native place. Thereafter, I immediately approached my advocate, Mr. M.C. Kapadia in September 1994 and got the matter prepared and as my advocate Mr. M.C. Kapadia was suffering from colitis ulcer in the month of September. Hence matter was filed in the month of October, 1994, i.e. on 19-10-1994. As my advocate was shifted to Bombay for further medical treatment/investigation and operation, my matter could not come for admission." This Court, with a view to permit the petitioners to place on record the details, granted time. There is no detail as to on what date the letter was received; or when the deponent came to know about the order; or on what date deponent got operated for cataract; on what date he had gone to native place; and on what date he returned. Though time was granted, no details are given and we have rejected the request of ld. Advocate to grant further time.

4. Ld. Advocate for the petitioners submitted that earlier Special Civil Application was filed and as the petitioners were of the view that it is in the public interest to withdraw the petition, the petition was withdrawn for the benefits of school

going children and petition was not heard and decided on merits and therefore this Court should entertain the petition though earlier the petitioners have challenged the impugned order by a petition and withdrew subsequently. Mr. Kapadia, ld. Advocate further submitted that it was the petitioners who requested the Court to withdraw and the Court did not observe that after hearing the matter the Court was about to dismiss the matter, the petitioners withdrew the petition. According to him, if that would have been the fact, the Court would be justified in rejecting the application, but mere withdrawal would not come in the way of the petitioners.

5. This is a petition under Article 226 of the Constitution of India. The provisions contained in the Civil Procedure Code, and particularly Order XXIII, Rule 1 would apply to a petition under Article 226 of the Constitution of India, except a petition for habeas corpus.

6. The principle embodied in Order XXIII, Rule 1 has been extended to writ petition. This is not a case where a promise was given by the other side and on giving such promise the petitioners withdrew the petition. But the petitioners withdrew of their own. Where a party unconditionally withdraws his suit or Special Civil Application in view of the matter in dispute being referred to a party, then he cannot subsequently sue again in respect of such matter although the reference may have become infructuous. In the instant case, the petitioners left the matter to the discretion of the Municipal Commissioner and it was for him to decide the matter and that would not give him a fresh cause of action to file a writ petition, because what was challenged earlier was an award and today also, the petitioners have challenged the same award on the same available grounds. When the petitioners themselves did not want to invoke the jurisdiction of the High Court or having invoked the same did not want to press writ petition and if the petition is withdrawn, the same is not required to be entertained, unless the Court, while permitting withdrawal of a petition, has granted liberty to file a fresh petition on the same subject matter as contemplated under Rule 1, Order XXIII.

7. The Apex Court, in the case of Sarguja Transport Service vs. State Transport Appellate Tribunal, Gwalior, reported in AIR 1987 S.C. Page 88, has held as under;

"The law confers upon a man no rights or benefits which he does not desire. Whoever waives, abandons or disclaims a right will lose it. In order to prevent a litigant from abusing the process of the Court by instituting suits again and again on the same cause of action without any good reason the Code insists that he

should obtain the permission of the Court to file a fresh suit after establishing either of the two grounds mentioned in sub-rule (3) of R.1 of O. XXIII. The principle underlying the above rule is founded on public policy, but it is not the same as the rule of res judicata contained in S.11 of the Code which provides that no court shall try any suit or issue in which the matter directly or substantially in issue has been directly or substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a Court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such Court. The rule of res judicata applies to a case where the suit or an issue has already been heard and finally decided by a Court. In the case of abandonment or withdrawal of a suit without the permission of the Court to file a fresh suit, there is no prior adjudication of a suit or an issue is involved, yet the Code provides, as stated earlier, that a second suit will not lie in sub-rule (4) of R.1 of O. XXIII of the Code when the first suit is withdrawn without the permission referred to in sub-rule (3) in order to prevent the abuse of the process of the Court."

"The question for our consideration is whether it would or would not advance the cause of justice if the principle underlying R.1 of O. XXIII of the Code is adopted in respect of writ petitions filed under Art. 226/227 of the Constitution also. It is common knowledge that very often after a writ petition is heard for some time when the petitioner or his counsel finds that the Court is not likely to pass an order admitting the petition, request is made by the petitioner or his counsel, to permit the petitioner to withdraw from the writ petition without seeking permission to institute a fresh writ petition. A Court which is unwilling to admit the petition would not ordinarily grant liberty to file a fresh petition while it may just agree to permit the withdrawal of the petition. It is plain that when once a writ petition filed in a High Court is withdrawn by the petitioner himself he is precluded from filing an appeal against the order passed in the writ petition because he cannot be considered as a party aggrieved by the order passed by the High Court."

The Apex Court further held as under;

"But we are of the view that the principle underlying R.1 of O. XXIII of the Code should be extended in the

interests of administration of justice to cases of withdrawal of writ petition also, not on the ground of res judicata but on the ground of public policy as explained above. It would also discourage the litigant from indulging in bench-hunting tactics. In any event there is no justifiable reason in such a case to permit a petitioner to invoke the extraordinary jurisdiction of the High Court under Art. 226 of the Constitution once again. While the withdrawal of a writ petition filed in High Court without permission to file a fresh writ petition may not bar other remedies like a suit or a petition under Art. 32 of the Constitution since such withdrawal does not amount to res judicata, the remedy under Art.226 of the Constitution should be deemed to have been abandoned by the petitioner in respect of the cause of action relied on in the writ petition when he withdraws it without such permission."

We would say that ld. Advocate, Mr. Kapadia argued on the ground of res judicata but, in view of the above decision, his arguments are required to be rejected.

8. In the instant case, the petitioners abandoned their right to prosecute the said Special Civil Application which they filed earlier and thought it fit to take a decision from the Commissioner, Surat Municipal Corporation, and that would not give them a ground to file a fresh petition. Above all, even the order passed by the authority is not placed on record. In this view of the matter, we reject this petition.

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